2010

# Energy Claims Limited v. Catalyst Investment Group Limited : Response to Petition for Rehearing

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

**Appeal No. 20100128-CA**

**ENERGY CLAIMS LIMITED, a British Virgin Islands Company,**
**Appellant,**
**v.**
**CATALYST INVESTMENT GROUP LIMITED, *et al.*,**
**Appellees.**

On Appeal from the Third Judicial District Court for Salt Lake County, Utah
The Honorable Tyrone E. Medley
District Court Civil No. 090900505

# OPPOSITION OF APPELLEES CATALYST INVESTMENT GROUP LIMITED, ARM ASSET-BACKED SECURITIES, AND TIMOTHY ROBERTS TO APPELLANT'S PETITION FOR REHEARING


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**OPPOSITION OF APPELLEES CATALYST INVESTMENT GROUP LIMITED, ARM ASSET-BACKED SECURITIES, AND TIMOTHY ROBERTS TO APPELLANT'S PETITION FOR REHEARING**

Pursuant to Utah Rules of Appellate Procedure 35 and this Court's request dated November 16, 2011, Appellees Catalyst Investment Group Limited ("Catalyst"), ARM Asset-Backed Securities, S.A. ("ARM"), and Timothy Roberts ("Roberts") respectfully submit this opposition to the petition of Appellant Energy Claims Limited ("ECL") for a rehearing of the Court's Opinion dated October 14, 2011 and numbered 2011 UT App 342 (the "Opinion" or "Op."). In the Opinion, this Court affirmed the trial court's exercise of discretion in dismissing Appellant's action on grounds of *forum non conveniens* and improper venue.

## I. THE STRINGENT STANDARD FOR A PETITION FOR REHEARING MANDATES DENIAL OF APPELLANT'S PETITION.

The Court's 29-page Opinion addressed each of Appellant's arguments in painstaking detail, thoroughly considered applicable law, and upheld the trial court's exercise of discretion. On this application, Appellant merely seeks to rehash arguments made and rejected, without pointing to any material fact the Court overlooked, and without citing any controlling decision or statute that contradicts the Court's legal analysis. Accordingly, there is no reason this matter should burden the Court and the Utah judicial system further.

Petitions for rehearing may be granted only when the court overlooks or misapprehends a material fact or bases its decision on an incorrect principle of law. UTAH R. APP. P. 35; *see also Cummings v. Nielson*, 42 Utah 157, 129 P. 619, 624 (Utah

1912) ("When this court . . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result."); *Brown v. Pickard*, 4 Utah 292, 294, 11 P. 512, 512 (Utah 1886) ("We long ago laid down the rule that, to justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case . . . ." (internal citations omitted)).

Appellant fails to meet this standard. Instead its Petition repeatedly and improperly revisits arguments already presented to and disposed of by the Court. *See, e.g.*, *Brown*, 11 P. at 512 ("Where a case has been fully and fairly considered in all its bearings, a rehearing will be denied."). As the Utah Supreme Court has explained:

> We desire to add a word in conclusion respecting the numerous applications for rehearings in this court. . . . In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we would have to devote a very large portion of our time in answering counsel's contentions a second time; and, if we should grant rehearings because they are demanded, we should do nothing else save to write and rewrite opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contentions should not prevail, but in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound. Our endeavor is to determine all cases correctly upon the law and the facts, and, if we fail in this, it is because we are incapable of arriving at just conclusions. As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any, aid to us.

*Cummings*, 129 P. at 624. The same is true here. Appellant's mere dissatisfaction with the Opinion is no basis to proceed further. *See Beaver County v. Home Indem. Co.*, 88 Utah 1, 52 P.2d 435, 459 (Utah 1938) ("We cannot grant a rehearing for the purpose of dropping out of the opinion parts unsatisfactory to counsel and leaving in other parts evidently satisfactory to counsel.").

## II. THE COURT DULY CONSIDERED ALL ECL'S ARGUMENTS ON *FORUM NON CONVENIENS* UNDER UTAH LAW AND SHOULD NOT REHEAR POINTS ALREADY DECIDED.

Appellant argues that the Opinion applied a *forum non conveniens* standard inconsistent with Utah law. (Appellant's Petition for Rehearing ("Pet.") at 1.) However, Appellant fails to identify any controlling Utah decision or statute that the Court failed to consider, or that contradicts the Court's reasoning or holding. To the contrary, the Opinion expressly considered every controlling authority upon which Appellant relied then and now, and simply rejected Appellant's arguments. The Opinion thoroughly analyzed the Utah Supreme Court's decisions in *Summa Corp. v. Lancer Industries, Inc.*, 559 P.2d 544 (Utah 1977) (Op. ¶¶ 23-46), *Kish v. Wright*, 562 P.2d 625, 628 (Utah 1977) (*id.* ¶ 24), and *Mooney v. Denver & Rio Grande Western Railroad Co.*, 118 Utah 307, 221 P.2d 628 (1950) (*id.* ¶¶ 34-38). The Opinion similarly considered the Utah Open Courts provision. (*Id.* ¶ 23.) While applying the standards set forth in *Summa*, *Kish* and *Mooney*, the Court spent 7 paragraphs and 4 pages distinguishing certain of their facts (*id.* ¶¶ 34-40), which Appellant argued then and now should have precluded dismissal. Appellant's Petition offers no authority that the Court overlooked or that contradicts its well-reasoned analysis.

### A. The Court's Citation of One Florida Decision Does Not Supply a Basis for Reargument.

Despite the Opinion's clear reliance upon established Utah law, Appellant contends the Court improperly adopted a purported Florida rule that *forum non conveniens* dismissal may be based solely upon the allegations of a complaint. (Pet. at 1-6.) ECL misstates the holding of the Court.[1]

First, the Court did not adopt any such "rule," but merely cited the Florida decision as illustrative of the proposition that the allegations of a Complaint, as admissions of a plaintiff, may be sufficient evidence of inconvenience unless plaintiff presents evidence supporting its choice of forum. (Op. ¶ 40 (citing *WEG Indus., S.A. v. Compania De Seguros Generales Granai*, 937 So. 2d 248, 254 (Fla. Dist. Ct. App. 2006)). This is wholly consistent with controlling Utah law. In *Summa*, the Supreme Court observed without disapproval that the motion to dismiss was based on facts "*shown in the pleadings* and affidavits." 559 P.2d at 545 (emphasis added). In *Mooney*, the Court also looked to allegations of the complaint in analyzing convenience factors, concluding that they did not warrant dismissal. 221 P.2d at 648. There is no support in

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[1] Appellant's claim that the Opinion "Adopt[ed] . . . Florida's 'Face of the Complaint' Approach" is disingenuous. (Pet. at 1.) The Opinion does *cite* a single Florida case for the proposition that the trial court could rely upon the allegations of the complaint in deciding that the evidence and witnesses are located primarily in Europe. (Op. ¶ 40.) But this citation does not indicate, nor did the Court hold, that a different Florida standard applies to the *forum non conveniens* analysis.

these decisions for Appellant's proposition that a complaint can only be considered to overturn, but not uphold, a *forum non conveniens* dismissal.[2]

Second, the Court did not endorse dismissal solely upon Appellant's admissions in the Complaint, but considered other evidence, including, *inter alia*, two agreements containing choice of law and forum selection clauses in favor of England and Wales and a declaration from Catalyst. (Op. ¶¶ 31-46.) After careful analysis, the Court determined that, taken together, such evidence supported the trial court's discretionary finding that the *Summa* convenience factors weighed in favor of dismissal. (*Id.*) In doing so, the Court rejected Appellant's arguments (repeated here, Pet. at 1), that there was insufficient evidence to support dismissal, and distinguished the facts of this case from those in *Summa* and *Mooney*. (*Id.* ¶¶ 34-40.) Here, Appellant's "adoption of Florida law" argument merely repackages its earlier "insufficient evidence" position and presents no controlling decision or statute that contradicts the Opinion's reasoning or conclusions.

Appellant also argues that the Opinion's reliance on allegations of the Complaint contradicts the requirement that, on a motion to dismiss, the complaint's allegations be construed in the plaintiff's favor. (Pet. at 5.) However, the Opinion clearly applied the very standard cited by Appellant. (*See* Op. at 2 n.1 ("'[W]e view the facts and construe the complaint in the light most favorable to the plaintiff and indulge all reasonable inferences in his favor." (quoting *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 810 (Utah 1993)).) Moreover, the Complaint's relevant admissions were plain and

[2] The allegations of the complaint, as explained by both the trial court and this Court, set forth in detail the predominantly European character of the parties and transactions in issue, and persuasively demonstrate that trial in this forum would be inconvenient.

unambiguous, and are not subject to any construction that contradicts the Court's rulings regarding convenience. Here again, Appellant improperly asks the Court merely to change its mind, not to apply an overriding principle of controlling law or consider material evidence it overlooked. Reargument should be denied.[3]

### B. The Court's Reliance on Federal Jurisprudence Did Not Conflict with Utah Law and Thus Should Not Be Disturbed on Rehearing.

Appellant argues that the Court adopted federal jurisprudence in conflict with Utah law in arriving at its decision as a basis for rehearing. (Pet. at 6-8.) Specifically, Appellant argues that the Court should not have endorsed the trial court's consideration of the director defendants' submission to jurisdiction in England and should not have afforded reduced deference to the forum choice of ECL, a non-Utah plaintiff. (*Id.*) But these are the same arguments ECL made below, and the same arguments the Court carefully considered and denied. (Op. ¶¶ 24, 29-30.) They are not an appropriate basis for rehearing.

Concerning the director defendants' submission to jurisdiction in England, the Court expressly decided that "[t]he trial court's consideration of this issue is consistent with the 'pre-requisite required' before a court declines to exercise jurisdiction over an

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[3] Appellant also contends that the Court's decision to uphold the trial court's findings as to the burdens of this case on that court was inconsistent with *Mooney*. (Pet. at 5. n.4.) Again, this argument is improper on a petition for rehearing because it merely takes issue with the reasoned decision of this Court. (Op. ¶ 44.) Additionally, the trial court was proper in making factual findings as to the burden on Utah courts and the absence of local concern over ECL's claims. Under the controlling decision in *Summa*, the court can and should consider "the burdens that may be imposed upon the court in question in litigating matters which may not be of local concern." 559 P.2d at 546. Thus, it was well within this Court's authority to uphold the trial court's findings regarding the burdens of adjudicating this matter, which had little, if any, connection to Utah.

action 'that another alternate, available forum is still open to the plaintiff.'" (Op. ¶ 24 (quoting *Kish*, 562 P.2d at 627-29).) It is apparent then that the Court fully considered this argument and found that consideration of submission to jurisdiction was in accordance with Utah law. The Court should not revisit that argument here.

Second, the Court's Opinion also considered and rejected Appellant's argument – offered again here – regarding the deference to be given ECL's forum choice. The Opinion first acknowledged that ECL's choice of forum is entitled to deference under both Utah and federal law. (Op. ¶ 29.) It then explained that post-Summa federal case law, including *forum non conveniens* decisions of the United States Supreme Court, affords less deference to foreign plaintiffs due to a weaker presumption that the local forum is convenient. (*Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981), and *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)).) Nothing in *Summa* contradicts that reasoning, and indeed *Summa* itself relied on United States Supreme Court precedent. *See Summa*, 559 P.2d at 546 n.5 (citing *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947)).[4] The Court recognized that "[w]hile Utah has not expressly adopted a similar view concerning nonresident plaintiffs, the reasons for the distinction are persuasive. Unlike a plaintiff who resides in Utah, a foreign plaintiff's choice of forum is not obviously convenient." (Op. ¶ 29.) The Court also determined

[4] Appellant argues that the Court should not have relied upon United States Supreme Court precedent on the deference point, while rejecting a threshold choice-of-law requirement applied in a minority of federal circuit courts. (Pet. at 6.). Apart from being a *non sequitur* and a rehash of arguments previously rejected (Op. at 9-10, n.6), Appellant's argument is unpersuasive because its proffered threshold requirement conflicts with controlling authority of both the Utah and United States supreme courts. The Court's reasoning regarding deference does not.

that the interest to Utah courts in assuring foreign plaintiffs access to Utah courts is weaker. (*Id.*) Appellant offers no controlling Utah authority that contradicts this reasoning, and accordingly fails to make a case for rehearing.

Further, Appellant mischaracterizes the Opinion and Utah jurisprudence regarding application of the Utah Open Courts provision. (Pet. at 7.) In its Opinion, the Court specifically addressed the Utah Open Courts provision, and here Appellant again merely quibbles with the Court's reasoning. The Court observed that the provision "'accord[s] the plaintiff the assurance' of constitutional access to the courts." (Op. ¶ 23 (quoting Utah Const. art. I, § 11).) The Court then explained : "While the trial court was required to exercise 'great caution' before preventing ECL from pursuing its claims in Utah, it was not required to assign determinative weight to ECL's choice of forum in balancing the *Summa* factors." (*Id.* ¶ 30.) Nothing in the Court's reasoning suggests the conclusion advanced by Appellant, that Utah courts would no longer be "open" to foreign plaintiffs. Foreign plaintiffs continue to have "substantially the same access" to Utah courts, but they must satisfy the same *forum non conveniens* standards applicable to all litigants, and the fact that a plaintiff is not present in Utah is a relevant fact in the convenience analysis. This was precisely what the Court held in its Opinion (¶¶ 29-30), and no controlling authority offered by Appellant contradicts it.[5]

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[5] Appellant also contends that the Opinion does not address the trial court's failure to consider the burden on ECL by dismissal. (Pet. at 8.) The trial court and this Court were not required by Utah law to consider "the burden" on ECL, but rather take into account ECL's choice of forum. *Summa*, 559 P.2d at 547. As described at length herein, the Court did carefully consider ECL's choice of forum. This argument therefore should be disregarded.

## III. THE OPINION CONSIDERED *ARMCO* AND ITS DISTINCTION OF IT DID NOT AFFECT ITS DECISION AND IS NOT CONTRARY TO LAW.

Appellant argues that the Court should rehear its decision upholding the dismissal of ARM because it mistakenly analyzed the decision in *Armco Inc. v. North Atlantic Insurance Co.*, 68 F. Supp. 2d 330 (S.D.N.Y. 1999). (Pet. at 9-10.) Once again, Appellant merely asks the Court to re-analyze an issue and come out with a different conclusion. (*See* Op. ¶¶ 49-52.) The argument is not based on any controlling authority that contradicts the Court's decision or that the Court overlooked. Accordingly, it does not support rehearing.

Furthermore, Appellant's argument lacks merit. First, the Court properly distinguished the facts of *Armco* from the facts of this case, finding that "unlike the situation in *Armco*, ECL's cause of action for breach of fiduciary duty is based on terms embodied in the Subscription Agreement." (*Id.* ¶¶ 49-50.) Appellant does not identify any material facts that the Court overlooked in reaching this conclusion.

Second, the Court's treatment of *Armco* was not a necessary component of its approval of the trial court's finding that "the claims asserted in the complaint are 'related to' the Subscription Agreement." (*Id.* ¶ 51.) The Court properly concluded that Appellant's claims were related to and fell within the unambiguous forum selection clause of the Subscription Agreement, which did not contemplate any distinction between tort and contract claims (as ECL contended). (*Id.* ¶¶ 48-52.) Accordingly, *Armco* was not essential to the Opinion. In any event, ECL has not shown that the Court overlooked or misapprehended a material issue of fact or law.

## IV. APPELLANT'S ARGUMENTS THAT THE COURT MISSTATED THE RECORD DO NOT PROVIDE ANY BASIS FOR REHEARING.

Appellant engages in several arguments concerning the Court's analysis of the trial court's decision and the allegations of the Complaint, contending that this provides a basis for rehearing. (Pet. at 10-12.) Appellant argues that the Opinion misstates the trial court's finding on the second *Summa* factor and incorrectly states ECL's allegations of civil conspiracy. (*Id.*) The Court analyzed each of these contentions on the appeal, and Appellant presents no valid reason to revisit them here.

First, contrary to Appellant's contention, the Court correctly considered *Summa*'s second factor, *i.e.*, where the fact situation creating the controversy arose. (Op. ¶¶ 32-33.) The Court upheld the trial court's finding "that the majority of the transactions alleged by plaintiff in this complaint occurred largely in Europe and England," (R. 1378 at 6-7), stating that it agrees that "the majority of the facts creating the controversy arose in Europe" (Op. ¶ 33). In addition, the Court noted what Appellant states it omitted: that the trial court found that "some harm may have occurred in Utah." (Op. ¶ 33.)

Second, Appellant's contention that the Court did not analyze the allegations of the Complaint in a proper manner is not a basis for rehearing. The Court considered the allegations of the Complaint and found that they related to the Subscription Agreement. (*Id.* ¶¶ 48-52.) The Opinion analyzed the allegations in the way it saw fit and Appellant cannot receive an additional appeal on rehearing. Appellant's arguments are the same as

those the Court already considered and rejected, do not identify any material fact the Court overlooked, and thus they supply no ground for rehearing.[6]

## V. THE COURT CONSIDERED ALL PROPERLY BRIEFED ISSUES.

Lastly, Appellant argues that the trial court did not address all properly briefed issues. (Pet. at 12-14.) This contention is belied by the Opinion. The Court considered, but did not give weight to, Appellant's argument that the forum selection clause contained in the Subscription Agreement was obtained by "unconscionable means." (Op. ¶ 53 & n.14.) Appellant did not provide the Court with any evidence as to how the forum selection clause, rather than the mere allegations concerning the release in that same agreement, was obtained by unconscionable means, as required by *Prows*, 868 P.2d at 812.

The Court also did not fail to consider Appellant's argument that its choice of forum was entitled to deference. As explained above, the Opinion specifically discusses and rejects Appellant's contention that "the trial court erred in dismissing all three of ECL's causes of action because, as the plaintiff, ECL's choice of forum is entitled to deference." (Op. ¶¶ 29-30.) Appellant's dissatisfaction with the result of that analysis cannot be the basis for a rehearing. Thus, the Court should reject these arguments and deny the petition.

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[6] Appellant offers no authority for its contention that the Opinion improperly made "additional factual findings not made by the trial court." (Pet. at 11 n.8.) Appellant acknowledges that the purported findings were supported by the record. Accordingly, the Court did not even arguably overlook any material fact or controlling principle of law. Moreover, the purported findings were well within this Court's competence on appeal. *See McLeod v. Retirement Bd.*, 2011 UT App 190, ¶ 10, 257 P.3d 1090, 1092-93 (appellate court reviews a trial court's application of the facts to the law for correctness).

## CONCLUSION

For the foregoing reasons, the Court should deny Appellant's petition for rehearing.

DATED: December 14, 2011

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the foregoing Opposition of Appellees Catalyst Investment Group Limited, ARM Asset-Backed Securities, S.A., and Timothy Roberts to Appellant's Petition for Rehearing have been sent by first-class mail on December 14, 2011, to:

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